

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AMO DEVELOPMENT, LLC,)
AMO MANUFACTURING USA,)
LLC, and AMO SALES AND)
SERVICE, INC.,)

Plaintiffs,)

v.)

ALCON VISION, LLC, ALCON)
LABORATORIES, INC., and)
ALCON RESEARCH, LLC,)

Defendants.)

C.A. No. 20-842-CFC

Friday, January 13, 2023
1:00 p.m.
Oral Argument

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE COLM F. CONNOLLY
United States District Court Judge

APPEARANCES:

MORRIS NICHOLS ARSHT & TUNNELL
BY: JACK B. BLUMENFELD, ESQ.

-and-

1 APPEARANCES CONTINUED:

2
3 LATHAM & WATKINS
4 BY: MICHAEL A. MORIN, ESQ.
5 BY: RACHEL RENEE BLITZER, ESQ.
6 BY: SARANG V. DAMLE, ESQ.
7 Counsel for the Plaintiff

8 SHAW KELLER
9 BY: JOHN W. SHAW, ESQ.

10 -and-

11 KIRKLAND & ELLIS
12 BY: JEANNE M. HEFFERNAN, ESQ.
13 BY: GREGG F. LOCASCIO, ESQ.
14 BY: NOAH S. FRANK, ESQ.
15 BY: RYAN MELD, ESQ.

16 Counsel for the Defendants

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P R O C E E D I N G S

(Proceedings commenced in the courtroom beginning at 1:00 p.m.)

THE COURT: Good afternoon. Please be seated.
Mr. Blumenfeld.

MR. BLUMENFELD: Thank you, Your Honor.

Jack Blumenfeld from Morris Nichols for the plaintiffs. And with me at counsel table, all from Latham & Watkins, are Mike Morin, Sy Damle, and Rachel Blitzler.

THE COURT: Great. Thank you.

MR. BLUMENFELD: Thank you.

THE COURT: Mr. Shaw.

MR. SHAW: Good afternoon, Your Honor.
John Shaw for defendants. Joining me at counsel table from Kirkland & Ellis, Gregg LoCascio, Jeanne Heffernan; and second row, Ryan Melde and Noah Frank. And then from Alcon, in the gallery, Jeff Prokop.

THE COURT: Okay. Thank you.

All right. So let's deal with the Stamm motion. All right?

MS. HEFFERNAN: Good afternoon, Your Honor.
For the record, Jeanne Heffernan on behalf of Alcon.

The question here is whether Ms. Stamm's established the required causal nexus to recover indirect

1 profits for IOLs, intraocular lenses, which themselves
2 indisputably do not infringe any of the asserted
3 copyrights in the case. They don't contain any of the
4 copyrighted materials.

5 Ms. Stamm -- just to be clear, Ms. Stamm seeks
6 indirect profits on other products as well, beyond just
7 IOLs. That is not part of our motion. We will take that
8 up at another time. We don't -- I just want to be clear
9 for the record. We don't concede a nexus as to those
10 other products.

11 But focusing on the IOLs, what contains the
12 infringing code here, the allegedly infringing code, is
13 the LenSx laser. Intraocular lenses contain no source
14 code. Alcon IOLs are not required --

15 **THE COURT:** Let me stop you there. Here's the
16 thing: So I actually -- I'll just tell you what gave rise
17 to this. I was ready to write an opinion going your way.
18 I think they're stretching the case law, but then I get to
19 this Page 9 of their brief, and it throws me for a loop.

20 It says that Stamm's opinion only included
21 those IOL sales to customers who had purchased a LenSx,
22 and only after the LenSx purchase had occurred.

23 And I don't think -- and they save it for the
24 end. It's like the last page, right. And I've got -- and
25 then I thought, wait, this is different than I thought.

1 And if it's truly that narrow, then I'm thinking, well,
2 what else is she supposed to do?

3 So where I am is, I don't really get the facts
4 because neither of you kind of say, hey, here's a report,
5 here's exactly what she says.

6 And so I -- that's why I said, you know what?
7 I'm not going to spend any more time on this, I'm going to
8 bring you all in, and let me figure out.

9 So do you agree that she is only including IOL
10 sales, one, to customers who had purchased a LenSx; and
11 two, only after the LenSx purchase had occurred?

12 Is that right?

13 **MS. HEFFERNAN:** That is correct, Your Honor.

14 **THE COURT:** Okay. Now, my second question,
15 they don't answer and you don't answer this. So do these
16 LenSx -- I don't know how these operations work, these
17 doctor operations.

18 So in other words, if you're selling to a
19 doctor's practice and all that doctor's practice does
20 is -- what do you call it? FLAM --

21 **MS. HEFFERNAN:** FLACS.

22 **THE COURT:** FLACS, right. FLACS or FLACS, is
23 that how you pronounce it?

24 **MS. HEFFERNAN:** Yes.

25 **THE COURT:** -- FLACS surgery, well, then that

1 seems pretty reasonable, what she's doing.

2 On the other hand, if an individual practice is
3 doing all sorts of other things, besides FLACS surgery,
4 well, then I think that might be a problem, but it may not
5 because it may not be possible for them to come up with
6 anything more granular, that they're kind of stuck with
7 the way you do your books.

8 So do you get where I'm coming from now?

9 **MS. HEFFERNAN:** I think I do.

10 **THE COURT:** All right. So address those
11 issues, please.

12 **MS. HEFFERNAN:** Sure. So in these practice
13 groups, one, the groups that have a FLACS machine, which
14 could be any manufacturer's Femtosecond-Laser-Assisted
15 cataract surgery machine, or LenSx accounts -- if we want
16 to focus specifically on LenSx accounts for the moment --
17 a LenSx can be placed into an account that is already
18 doing maybe another manufacturer's FLACS surgery. You can
19 have two different FLACS machines.

20 **THE COURT:** Okay. So I could be, basically, an
21 ophthalmologist --

22 **MS. HEFFERNAN:** Yes --

23 **THE COURT:** -- and I've got a bunch of
24 different machines in my practice --

25 **MS. HEFFERNAN:** Right.

1 **THE COURT:** -- one room is LenSx, one room
2 something else.

3 **MS. HEFFERNAN:** Could have a Catalys in another
4 room. Exactly.

5 **THE COURT:** Right. Okay.

6 **MS. HEFFERNAN:** Or the vast majority of the
7 procedures at that specific surgery site could be done
8 manually even in the presence of a FLACS machine, whether
9 that's a LenSx or some other device. And in fact
10 97 percent of surgeries worldwide are done manually.

11 And even the doctors, who you'll hear from at
12 trial who do FLACS surgeries, also do manual surgeries.
13 And in some cases, have multiple FLACS devices at their
14 accounts.

15 **THE COURT:** All right. So all that weighs in
16 favor of you with that. And I want to hear from them,
17 obviously. But, you know, then I'd still be off to, okay,
18 well, I think your motion has legs.

19 But then what I'm going to guess they're going
20 to come up with is, and I don't know, but -- because it's
21 not in the papers, is, well, how do you do your books,
22 right. And it may be -- like, I think they're stretching
23 it.

24 **MS. HEFFERNAN:** Right.

25 **THE COURT:** You know, the case law is -- what

1 the case law says is, you can't use, basically, the gross
2 revenue for the company. That's -- you know, we're not
3 going to do that. Right?

4 **MS. HEFFERNAN:** Or even gross revenues for
5 entire product line.

6 **THE COURT:** Well, see, that's where we need to
7 get in. It could be. Like, I think if it's General
8 Motors and it's the particular car, it may be because
9 depends where the parts -- what else are they used for,
10 right? It could be.

11 But I think Congress put this in the statute
12 because it foresaw the difficulty with parsing these
13 revenue numbers. And so there is somewhat, if you will,
14 of a burden on the defendant. I mean, if you structure
15 your books so that there is no way to parse this out,
16 well, then that may be what this statute is all about.

17 So how do you book the revenue to a doctor's
18 practice?

19 **MS. HEFFERNAN:** Before I get there, could I
20 just continue to finish here your first?

21 **THE COURT:** Yes.

22 **MS. HEFFERNAN:** Because there's some more at
23 play in the surgery site.

24 **THE COURT:** Okay.

25 **MS. HEFFERNAN:** So in addition to a FLACS

1 machine, whether you do FLACS or by manual, you've got
2 other machines already in place at those surgery centers
3 that are part of the cataract surgery procedure. You have
4 phacoemulsification machines. You may have other products
5 like a digital marking machine to help place an advanced
6 technology IOL correctly into the capsule.

7 There are lots of other pieces of equipment
8 that all make up part of the cataract surgery.

9 IOL is what gets implanted at the end. It is
10 the only piece of equipment that the patient leaves with
11 and has in his or her eye forever.

12 And the decision-making process for which IOL
13 to implant, you'll hear from both sides' experts say, has
14 nothing to do with the manufacturer of the FLACS machine.
15 It has to do with what the patient requires. What kind of
16 needs does that patient have for seeing at the end of the
17 cataract surgery.

18 **THE COURT:** Right.

19 **MS. HEFFERNAN:** So those IOLs, not tied one to
20 one with a manufacturer of a FLACS machine --

21 **THE COURT:** Right. I've got that.

22 **MS. HEFFERNAN:** -- or any other machine.

23 **THE COURT:** Right.

24 **MS. HEFFERNAN:** And, in fact, the sales
25 procedure, kind of getting to your second question, is --

1 for IOLs, is to, all of the manufacturers of IOLs, place
2 their IOLs on consignment at surgery centers and
3 hospitals. The hospitals don't actually buy the lenses
4 from the outset at all.

5 **THE COURT:** It's only when they use them.

6 **MS. HEFFERNAN:** It's only when they're used.
7 And when they're used, they're used based on the doctor's
8 decision for that particular patient and that patient's
9 needs, not based on the FLACS machine or --

10 **THE COURT:** All right. Now, let me just ask
11 you, if the experts address this: Do you have exclusive
12 supply arrangements, such that if you're Dr., you know,
13 Smith, you've got your practice, you're only buying IOLs
14 from one supplier?

15 **MS. HEFFERNAN:** That's not how it happens.

16 **THE COURT:** No.

17 **MS. HEFFERNAN:** There's no evidence of that in
18 the record at all. In fact, the evidence is just the
19 opposite.

20 For example, for Alcon -- and I'm sure they'll
21 talk about J&J and their practices. But for Alcon, the
22 salesperson who goes in to sell a FLACS, the LenSx,
23 doesn't have responsibility for IOLs or any other piece of
24 equipment. And, in fact, the surgical side that has the
25 FLACS devices, the LenSx devices in them, totally separate

1 business at Alcon from the IOL business.

2 **THE COURT:** All right. Let me put the breaks a
3 little there, okay? Because, you see, this is what I
4 meant, I want oral argument. There's something to their
5 side.

6 You've got PowerPoints. You definitely think
7 that LenSx sales drive IOL sales.

8 Now, they go too far, you know.

9 **MS. HEFFERNAN:** Right.

10 **THE COURT:** I get that. And my only question
11 is: Are they going too far, though, because your books
12 don't allow for parsing, in which case then, I think we're
13 going to have to look at this statute. Because this
14 statute contemplates, right, that burden shift at some
15 point.

16 Agreed?

17 **MS. HEFFERNAN:** I agree. I agree, but the
18 burden shift is not at the causal nexus step.

19 **THE COURT:** All right. Well, let's get to the
20 facts first. So let's go with the facts.

21 **MS. HEFFERNAN:** Let me go back to the anchoring
22 documents.

23 **THE COURT:** Yeah.

24 **MS. HEFFERNAN:** Okay. There's no question,
25 those documents are there and that language is used. What

1 those documents show is some correlation. Causation? No.
2 They do not establish causation. They do show
3 correlation.

4 **THE COURT:** Okay.

5 **MS. HEFFERNAN:** Which is why, Your Honor, we
6 did not move on the \$772-million figure Ms. Stamm
7 calculates based on those documents.

8 **THE COURT:** Right. But then I want to know:
9 How do you come up with the 40 percent, or whatever the
10 percentage was? What was it? It's been a couple weeks.
11 Yes, 40 percent of U.S. --

12 **MS. HEFFERNAN:** Are you going to the -- oh, the
13 deductions that Ms. Davis takes, the 38 percent?

14 **THE COURT:** Is that what she's getting that
15 from? Is she basically getting 772 from the PowerPoint?

16 **MS. HEFFERNAN:** No, no, no. No, not -- no.

17 **THE COURT:** All right.

18 **MS. HEFFERNAN:** So Ms. Stamm calculates
19 \$511 million of what she calls "pull-through sales," so --
20 allegedly with a causal nexus. We disagree; say it's
21 correlation, not causation.

22 She arrives at the 511 by using those documents
23 you just referred to, Your Honor.

24 **THE COURT:** Okay.

25 **MS. HEFFERNAN:** In her reply report, she does a

1 totally different set of calculations not based on those
2 documents; instead, she bases them on the difference, the
3 delta in IOL penetration at surgery centers or accounts
4 that have an Alcon phaco machine and a LenSx machine on
5 the one hand, and accounts that have an Alcon phaco
6 machine and a J&J Catalys on the other.

7 She does a comparison between those two
8 accounts in terms of the penetration of IOLs that are sold
9 into each of those accounts and does a calculation based
10 on that to say, there is pull-through of \$772 million at
11 accounts where there is a LenSx placed with an Alcon
12 phaco, versus accounts where there's a J&J Catalys placed
13 with an Alcon phaco.

14 Again, we say that's correlation, not
15 causation. But she performs that calculation.

16 For sake of this motion, we don't challenge
17 that. We do challenge the merits of that, but that's not
18 what we have before Your Honor.

19 The only thing we have before Your Honor is her
20 3.1-billion-dollar calculation, and that's because it's
21 legally flawed. That's the calculation where Ms. Stamm
22 says, "I can show you pull-through for the entire pot of
23 IOL revenues of 3.1 billion dollars" --

24 **THE COURT:** Right. But that 3.1 -- this is
25 what I didn't get until I got to Page 9 of their brief.

1 That 3.1 is two customers who had purchased a LenSx, and
2 it includes revenue from those customers only after they
3 purchased the LenSx.

4 Is that right?

5 **MS. HEFFERNAN:** Yes. But, Your Honor, may I
6 add to that?

7 **THE COURT:** Hold on.

8 **MS. HEFFERNAN:** Okay.

9 **THE COURT:** So then, tell me about now -- and
10 don't answer anything else. I only want to know --

11 **MS. HEFFERNAN:** Okay.

12 **THE COURT:** -- what do your revenue books look
13 like that you give to them?

14 Like, in other words --

15 **MS. HEFFERNAN:** Right.

16 **THE COURT:** -- and if you could put one on the
17 screen, that would be great.

18 Is there a way that they could break that down,
19 or is it, no, you just have IOLs -- I get some IOL sales.
20 I'm going to tell you right now, they should be allowed to
21 put in front of the jury that there's a connection between
22 some IOL sales and LenSx sales. I think that's fair. All
23 right.

24 Now, should they be allowed to put the entire
25 revenue of the business? Of course not. I think that's

1 what the case law is really clear about, right?

2 And then the only issue is: Should they be
3 allowed to put the entire IOL sales in front of the jury?

4 And that could be misleading, and I think it
5 could be wrongly admitted under the law. But where are
6 you going to draw the line?

7 So tell me. Show me your books or tell me.

8 **MS. HEFFERNAN:** So in terms of -- they are
9 separate books between the LenSx and the IOLs. And both
10 at J&J and at Alcon, neither company tracks IOL deductions
11 on an IOL basis. Like, they don't do it on a product
12 basis. So the P&Ls at both J&J and Alcon are not done at
13 the product level basis. They're done at the business
14 level basis.

15 And so that's why, for example, when we analyze
16 our deductions, our expert Julie Davis, which is the
17 subject of their *Daubert* motion, has to use a document
18 that created those P&Ls specifically for a particular
19 purpose.

20 And we'll get into that. I think Mr. Damle is
21 arguing that motion later.

22 **THE COURT:** Oral argument now --

23 **MS. HEFFERNAN:** Okay.

24 **THE COURT:** We've got to get this one done.

25 **MS. HEFFERNAN:** Sure. But --

1 **THE COURT:** So I want to see how it affects
2 that one.

3 **MS. HEFFERNAN:** But I think what's important
4 here in terms of sales of the IOLs, is that Ms. Stamm
5 admits that not every IOL sold into a LenSx account is
6 even used with a LenSx.

7 **THE COURT:** Why is that compelling? Why does
8 that matter?

9 **MS. HEFFERNAN:** Because there's no connection
10 at all that that --

11 **THE COURT:** But why --

12 **MS. HEFFERNAN:** -- between the LenSx and the
13 IOL.

14 **THE COURT:** But, see, this is where I think --
15 let's go back to the statute, right.

16 504(b) says, quote, "In establishing the
17 infringer's profits, the copyright owner is required to
18 present proof only of the infringer's gross revenue, and
19 the infringer is required to prove his or her deductible
20 expenses in the elements of profit attributable to factors
21 other than the copyrighted work."

22 Now, for profits. You know, the statute
23 doesn't define what gross revenue is. The sentence that
24 immediately precedes this sentence in 504(b), says, quote,
25 "The copyright owner is entitled to recover the actual

1 damage suffered by him or her as a result of the
2 infringement."

3 **MS. HEFFERNAN:** Right.

4 **THE COURT:** Right? So I think if you're
5 selling, I mean -- and what is it? Convoyed sales in the
6 patent context. You can get -- recover profits for
7 convoyed sales, right?

8 **MS. HEFFERNAN:** We don't disagree with that.

9 **THE COURT:** Right. All right.

10 **MS. HEFFERNAN:** If the proof is there.

11 **THE COURT:** Yeah, yeah. All right. So then,
12 you don't dispute that.

13 So now let's focus on this second sentence.
14 "In establishing the infringer's profits, the copyright
15 owner is required to present proof only of the infringer's
16 gross revenue, and then the infringer is required to prove
17 deductible expenses and elements of the profit
18 attributable to factors other than copyright work."

19 **MS. HEFFERNAN:** That's right.

20 **THE COURT:** So...

21 **MS. HEFFERNAN:** So I would -- I think the
22 Courts have read that statute by reading the sentence you
23 read before, the profits, 504(b), which is, the revenues
24 have to be, I think, "attributable to, reasonably related
25 to."

1 **THE COURT:** Reasonably related to. I agree
2 with that.

3 **MS. HEFFERNAN:** Reasonably related to --

4 **THE COURT:** Right. But IOLs -- let's put it
5 this way: IOLs used for FLACS surgery with a LenSx are
6 very reasonably attributable, right?

7 **MS. HEFFERNAN:** No. No, they are not.

8 **THE COURT:** Really?

9 **MS. HEFFERNAN:** Because the same IOL,
10 97 percent of the time, is used in a manual surgery.
11 There's no causal connection between --

12 **THE COURT:** I posited a causal connection. I
13 said, "IOL used in FLACS surgery with a LenSx are
14 reasonably attributable."

15 You don't even agree with that?

16 **MS. HEFFERNAN:** Not the way that "reasonably
17 attributable" has been understood by the case law.

18 (Cross-talking.)

19 **THE COURT:** So you would have no convoyed
20 sales. You would say IOLs are -- they're out 100 percent,
21 you can never have an IOL.

22 **MS. HEFFERNAN:** Yes. Yes. Unless there's some
23 evidence that we have not seen in this case that
24 customers, doctors, are making purchasing decisions. And
25 in this case, because everything is on consignment, the

1 decision to actually implant a particular IOL, because of
2 the code in the LenSx device.

3 **THE COURT:** Your own documents say that LenSx
4 drives and leverages IOL sales. How can you stand here
5 and say, no, we don't count any IOLs?

6 **MS. HEFFERNAN:** I can say that because those
7 documents, at best, show a correlation. It's sort of
8 like --

9 **THE COURT:** Drive? Drive is not a correlation.

10 **MS. HEFFERNAN:** Well, sure, but those documents
11 also are marketing documents that were created with 504(b)
12 in mind.

13 **THE COURT:** No, they were created by people --
14 you're right. They weren't thinking about a lawsuit.
15 They're thinking about just reality.

16 **MS. HEFFERNAN:** They were thinking about ways
17 to get more investment in their business and arguing that
18 there is this correlation, so we should get more
19 investment into your business. But you have to --

20 **THE COURT:** Wow. So you're going to take the
21 position that IOLs, period, are out. Okay.

22 **MS. HEFFERNAN:** Unless they can demonstrate a
23 causal nexus, which is their burden. And once they
24 demonstrate a causal nexus, only then does the burden
25 shift to the defendant to prove deductions and also do an

1 apportionment, which is the second part of the statute
2 that Your Honor read.

3 **THE COURT:** Can you cite a case for me that
4 says that the reasonably attributable test is causal
5 based?

6 **MS. HEFFERNAN:** Sure. I think that I can cite
7 *Leonard v. Stemtech*. Let me go to that.

8 *Leonard v. Stemtech* is 834 F.3d 376 out of the
9 Third Circuit in 2016.

10 **THE COURT:** Right. And it says, quote, "Courts
11 interpret 'gross revenue' to mean 'the gross revenue that
12 is reasonably related to the infringement.'" They're
13 quoting Graham.

14 Do they say anything about causality?

15 **MS. HEFFERNAN:** They do. If you go further, it
16 says, "Under 504(b), we use a two-step framework for
17 recovery of indirect profits," which is what we're talking
18 about here, citing Graham again. "First, the plaintiffs
19 must demonstrate a 'causal nexus' between the infringement
20 and the infringer's gross revenue."

21 **THE COURT:** That's the infringement. I get
22 that. But it's the second part. I mean -- and then we've
23 got to figure out -- I mean, clearly, they've got to
24 establish that they made money from the sales from their
25 revenue, which would include the LenSx sales.

1 **MS. HEFFERNAN:** Right.

2 **THE COURT:** You're saying every single aspect
3 of it, there has to be a causal nexus.

4 **MS. HEFFERNAN:** For the indirect infringement,
5 absolutely, for the IOLs --

6 **THE COURT:** Okay. And then how would you --

7 **MS. HEFFERNAN:** -- because, otherwise, it would
8 be easier to get -- it would be easier to get damages for
9 IOLs than it would be for the LenSx itself, I mean, at
10 some point.

11 **THE COURT:** Well, at some point. That's where
12 I want to draw the line. But it's interesting, you want
13 to draw the line at zero.

14 **MS. HEFFERNAN:** In this -- under these
15 circumstances and the facts and the evidence in the case,
16 especially with their own experts saying, "That's not how
17 I make my purchasing decision."

18 We actually have, in this case, customers,
19 consumers who talk about their purchasing decisions.
20 Their own experts.

21 **THE COURT:** So that seems to be the
22 quintessential factual issue. You've got your own
23 internal documents from your marketing people that are
24 saying, "IOL sales are driven by LenSx."

25 Then why don't we just let the jury decide

1 that?

2 **MS. HEFFERNAN:** Okay, Your Honor. That's why
3 we did not move on the 511 or the 772. But the
4 \$3.1 billion is an entirely different kettle of fish.
5 And, in fact, those documents and her -- Ms. Stamm's
6 reliance on those documents to make her 511-million-dollar
7 calculation belies the notion that there is any causal
8 nexus to the \$3.1 billion.

9 She can only show, at best -- and we're giving
10 her this, for purposes of this motion -- a correlation
11 which she says is a causal nexus to \$511 million, or
12 alternatively, \$772 million.

13 The fact that she can perform that analysis for
14 that chunk of IOL revenues undercuts her alternative step,
15 which is to grab the whole kettle of fish.

16 **THE COURT:** So I was with you. Like I said, I
17 wrote it up without a clerk. I wrote it myself. I was
18 like, this is -- I can do this. And then I get to this
19 one sentence, though. And this is where I kind of lose
20 you. And maybe you just have to -- I don't know if you
21 brought a PowerPoint, but make a better argument for me
22 because they are limiting the universe. And that's where
23 I'm just wondering, well, should we just let the jury
24 decide then.

25 Because what they're saying is, hey, we --

1 Alcon, they're telling us, LenSx drives IOL sales, so
2 therefore, let's only count the IOL sales for Alcon
3 customers who bought a LenSx and we'll limit it to the
4 IOLs they bought after the LenSx.

5 Now, I still think it includes too much, right?
6 Because it includes the hand surgery, it includes the
7 surgery done with other machines, not LenSx.

8 But then, do you give them any basis or any
9 means by which they can pair that down?

10 **MS. HEFFERNAN:** They did, Your Honor.

11 **THE COURT:** Well --

12 **MS. HEFFERNAN:** They paired down the
13 \$3.1 billion to, alternatively, 511 or 772.

14 **THE COURT:** Right.

15 **MS. HEFFERNAN:** And by doing that, they have
16 some evidentiary basis. Jury can sort that out, unless
17 we, you know, get it JMOL.

18 **THE COURT:** Right. I guess the question,
19 though, is: You're okay with them doing the 772 --

20 **MS. HEFFERNAN:** I'm not okay with it, but, I
21 mean, we didn't move against that. It's not part of our
22 motion, and we footnoted that to make that clear.

23 **THE COURT:** It is clear.

24 But my question, though, is: Well, is there
25 something between 772 and 3.1 billion that they should be

1 allowed to bring in?

2 **MS. HEFFERNAN:** Absolutely not. They've got no
3 evidence for it, and if they had, we would have seen it.

4 **THE COURT:** Okay. How do they get the 772 --
5 would your -- is your position going to be the 772 is the
6 gross revenue that's referenced in 504(b)?

7 **MS. HEFFERNAN:** We are going to challenge that
8 at trial with their own witnesses who will say there isn't
9 a causal nexus in their purchasing decisions. So they
10 will -- yes, they will come into trial, if Your Honor
11 permits them to, and make that argument that the 772 is
12 the gross revenue.

13 **THE COURT:** Well, if I -- I thought you're not
14 moving to preclude them from making a 7 --

15 **MS. HEFFERNAN:** We are not moving to preclude
16 them from making that.

17 **THE COURT:** Okay. Well, since you're not, I'm
18 not going to preclude them either.

19 **MS. HEFFERNAN:** Okay. Fair enough.

20 **THE COURT:** All right. So my question is
21 then -- and then what you're going to do, apparently, is,
22 you're going to just say, there is no 772 because there's
23 no causality at all.

24 **MS. HEFFERNAN:** That's right.

25 **THE COURT:** Are you going to try to show

1 deductible expenses or elements of profit attributable to
2 factors other than the copyrighted work?

3 **MS. HEFFERNAN:** Absolutely.

4 **THE COURT:** Okay.

5 **MS. HEFFERNAN:** And we have that in Ms. Davis'
6 report.

7 **THE COURT:** Just give me a second.

8 Okay. Anything else?

9 **MS. HEFFERNAN:** I think I'll stop there, with
10 the opportunity to stand up after my colleague does --

11 **THE COURT:** Okay.

12 **MS. HEFFERNAN:** -- sits down.

13 **THE COURT:** Okay.

14 **MS. HEFFERNAN:** Thank you.

15 **MR. DAMLE:** Good morning, Your Honor. Sy Damle
16 for the plaintiffs.

17 **THE COURT:** All right.

18 **MR. DAMLE:** I'd like to start with just a
19 couple of factual points.

20 One is, I think we're on common ground of
21 \$3.1 billion in IOL revenues, is limited to IOL sales to
22 LenSx accounts after the LenSx was placed. And I
23 apologize that we didn't make that clear earlier.

24 **THE COURT:** No, no, no. In fact, you probably
25 didn't know, but what -- and I probably misstated.

1 What's not clear -- and it's only now that I
2 want to hear what you have to say -- is, so what's a LenSx
3 account?

4 And -- so do you agree that a LenSx account
5 could be a practice that has one LenSx machine that only
6 does a minority -- or that is only used in a minority of
7 the surgical procedures?

8 **MR. DAMLE:** That is a possibility, Your Honor.

9 **THE COURT:** That's a problem for you. Because,
10 see, that's the thing, is -- and that's -- when I got to
11 this page, I stepped back and I said, "Whoa, wait. I may
12 have been misinterpreting this."

13 **MR. DAMLE:** Your Honor, I think, just to answer
14 the second -- sort of, the factual question that you had,
15 which is: We don't have the level of granularity in order
16 to be able to disentangle that.

17 **THE COURT:** Well, how did you come up with 772?

18 **MR. DAMLE:** Okay. So the 772 was really a
19 response to an argument to a point that their expert had
20 made. Their expert tried to disprove any causal
21 relationship between a sale of a LenSx and IOL sales.

22 And so she did this analysis that compared IOL
23 penetration at -- LenSx accounts with IOL penetration at
24 Catalys accounts and came up with a number. And she
25 dismissed that number as -- you know, only four percentage

1 points.

2 Ms. Stamm did the math -- and this is really an
3 apportionment analysis, not a -- not an effort to
4 determine gross revenue. It was what is the causal -- how
5 much of the revenue is actually caused by the placement of
6 the LenSx, right. That's an apportionment analysis.

7 What she found, after doing that, looking at
8 that and doing the math, she said that adds up to 772.
9 That's a very different inquiry than the gross revenue
10 inquiry that is really our burden.

11 The 772 really goes to their burden.
12 Disentangling how much of the effect of the placement is
13 caused by the LenSx and how much is caused by other
14 factors. That's their burden.

15 **THE COURT:** Yeah. My sense is that you read --
16 you take too much liberty with the case on that. Not with
17 indirect gross revenue figures...

18 **MR. DAMLE:** Well, if I could discuss --

19 **THE COURT:** You know, I just don't think you
20 get to start with, oh, they had \$3.1 billion worth of --
21 for instance -- let me step back.

22 What's their total IOL sales; do you know?

23 **MR. DAMLE:** \$13 billion for -- across their
24 entire company. Yeah, 13 billion.

25 **THE COURT:** What's J&J's IOL sales?

1 **MR. DAMLE:** It's less. It's definitely less.

2 **THE COURT:** Do you have any idea? Is it
3 billions?

4 **MR. MORIN:** I would say, Your Honor -- I'm very
5 careful to be precise in court, so let me say it's a
6 guess -- a lower market share than them, but yes,
7 billions.

8 **THE COURT:** Okay. All right. So we think it's
9 \$13 billion, and then you narrow it down to 3.1 billion --

10 **MR. DAMLE:** Correct.

11 **THE COURT:** -- basically, those are the LenSx
12 accounts.

13 **MR. DAMLE:** Those are the LenSx accounts.

14 **THE COURT:** Right.

15 **MR. DAMLE:** And then the burden shifts to them
16 to say, well, only X percentage of them were actually used
17 in a LenSx procedure. We don't have that data. That's
18 really their burden.

19 And if I could just talk about the Volkswagen
20 case, because I think that's probably the most instructive
21 case. That was in the Eighth Circuit, but adopted -- the
22 reasoning was adopted by the Third Circuit.

23 So in that case, the plaintiff put forward
24 gross revenues for all Audi TT sales in the country during
25 the period of time the infringing commercial ran. That

1 was \$153 million, that we only ultimately got 570,000 of
2 that, but he was able to start with \$153 million.

3 The defendant made almost exactly the argument
4 that Alcon is making here, that: Look, not all sales are
5 made -- are caused by somebody watching a commercial.
6 Lots of other reasons. Brand loyalty, reputation. All of
7 that. Same things they point to.

8 The Court said -- rejected that argument and
9 said they'd satisfied the burden using circumstantial
10 evidence, that there was a reasonable relationship between
11 the infringement, the commercial, and the category of
12 revenue, sales of Audi TTs in the country.

13 And it said that even as it acknowledged that
14 there were likely people who had never seen the
15 commercial. They said part of the people -- part of that
16 \$153 million of gross revenue included people that bought
17 the car without even seeing the commercial, and probably
18 included people that were not influenced by the commercial
19 even if they did see it. But it didn't matter. The
20 plaintiff's burden was satisfied by showing that kind of
21 circumstantial evidence.

22 And as I think Your Honor appreciates, we have
23 their own documents, 17 different documents that talk
24 about --

25 **THE COURT:** But the commercial was for the car.

1 It wasn't for parts of the car. And it wasn't for, you
2 know, luggage carriers that you can buy and put on the
3 car, right, which would be much more like an IOL.

4 **MR. DAMLE:** Well, look, I think the important
5 of the documents is that Alcon regards the LenSx
6 respectively as a commercial.

7 **THE COURT:** Right. But, see, what I don't get
8 is, then why didn't your expert start at 40 percent?
9 Like, in other words, the only information your expert has
10 at the starting point, as I can infer from the briefs, is
11 the driving language coming out of the marketing
12 department.

13 And it, as far as -- of course, I'm not really
14 sure, but if I look at Page 3 of the brief, it's got those
15 PowerPoint slide. And it says: "LenSx represents about
16 \$90 million U.S. dollars in profit per year. LenSx
17 accounts represent 40 percent of Alcon's PC IOL."

18 Is that the same thing as an IOL, PC IOL?

19 **MS. HEFFERNAN:** It is a type of IOL, yes.

20 **THE COURT:** Okay. And how much of the IOL,
21 \$3.1 billion, is PC IOL?

22 **MR. DAMLE:** I think -- we think it's a -- I'm
23 not 100 percent sure.

24 **THE COURT:** Okay.

25 **MR. DAMLE:** I think it's a majority.

1 **MS. HEFFERNAN:** Because the advanced ^.

2 **MR. DAMLE:** Right. The PC IOLs are the
3 monofocal basic IOLs, the AT IOL.

4 **THE COURT:** Right. What I don't get is --
5 again, because you only give me limited information. I
6 didn't read the reports, and I don't think that's my
7 burden right now.

8 I'm thinking, okay, you should get 40 percent,
9 like the starting point. I mean, unless you've got
10 another document which says there's some other
11 correlation, you get 40 percent, especially given what has
12 been confirmed for me today, which is that these are not
13 inclusive supplier situations, and more importantly these
14 are not situations where once a doctor starts using the
15 LenSx, that's all they use. They don't do any other work
16 besides the LenSx involving IOLs.

17 **MR. DAMLE:** So I would point you to, there is a
18 lot of different evidence with lots of different
19 numbers --

20 **THE COURT:** Okay.

21 **MR. DAMLE:** -- showing this effect on IOLs.
22 Now, what portion -- again, our burden, under the
23 Volkswagen case, is to show that there is a reasonable
24 relationship, not to identify with precision which IOLs
25 were sold because of the infringement.

1 **THE COURT:** I just don't find Volkswagen that
2 compelling because it's not the same situation. The
3 Volkswagen -- in the Volkswagen case, I mean, the Audi is
4 the LenSx, right?

5 **MR. DAMLE:** No. In the Volkswagen situation,
6 the commercial is the LenSx. The commercial is what
7 drives Audi sales, right. The commercial is what's
8 infringing and the sales of the follow-on product, the
9 convoyed sale, follows on from that.

10 That's almost precisely the situation we have
11 here.

12 **THE COURT:** I guess, maybe I should -- to me --
13 okay. Then the commercial is the source code that's used
14 to operate the LenSx.

15 **MR. DAMLE:** The -- in the commercial, there
16 was -- the commercial wasn't entirely infringing. A part
17 of the commercial was infringing, so.

18 **THE COURT:** Yeah. I mean, it's not a really
19 good analogy. I mean, the copyright in the Volkswagen
20 case is the commercial?

21 **MR. DAMLE:** Is a piece of the commercial. It's
22 ten words of the commercial.

23 **THE COURT:** Fair enough. Copyright here is --

24 **MR. DAMLE:** Source code.

25 **THE COURT:** -- some number of words in the

1 total computer code that operates the LenSx?

2 **MR. DAMLE:** Correct.

3 **THE COURT:** All right. And let's just posit
4 that, that source code does indeed operate the LenSx.

5 **MR. DAMLE:** Yes. It is necessary to run it,
6 yes.

7 **THE COURT:** Necessary to run it. See, again,
8 that won't fit right with the commercial, because it's not
9 necessarily for a commercial to run the Audi. But there's
10 a correlation.

11 Like, I think, for me, what I do find
12 acceptable as an analogy is that the LenSx sales, what is
13 sold directly as the direct infringement, is coming from
14 the -- from the source code. It just doesn't fit very
15 well, the more I think it through.

16 I think that it's more attenuated here. Like I
17 said, if you want -- the equivalent, it seems to me,
18 perhaps, better in the context of the Volkswagen case,
19 would be extras that you buy sometimes when you buy the
20 Audi, but not always.

21 **MR. DAMLE:** Well, maybe I can give you a
22 different example, which is the Sunset Lamp case, which is
23 discussed in the Audi case --

24 **THE COURT:** Okay.

25 **MR. DAMLE:** -- is a case where it was a

1 door-opener product, right. The company sold a
2 door-opener product that was infringing. And they wanted
3 to recover lost sales from that door-opener product, but
4 also other products that are associated with that product.
5 Not necessarily tied one to one, but are associated with
6 the product.

7 And the Court said you are able -- that was a
8 lost profits context. The Audi case talks about it in the
9 disgorgement context, basically, to the same logic -- yes,
10 because these two products tend to be sold together,
11 right. A washer and dryer would be another example of
12 that, right.

13 These two products tend to be sold together.
14 You're able to get your lost profits, not just from the
15 infringed product, but from the product that tends to be
16 sold with it, right. And then the gross revenue is the
17 full amount, would be the full amount of sales for that
18 conveyed product. And then the burden shifts to them.

19 Now, they're able to -- they put forward, if
20 they have -- if Ms. Davis has done so. We don't think
21 they've done so, right. We don't think that Ms. Davis has
22 done an apportionment. But it is their burden to do that.

23 And why the \$3.1 billion matters. Ms. Stamm's
24 opinion is that, at least -- if you look at her response
25 to Ms. Davis' analysis, this is to show, that doesn't show

1 no causation. It shows that at least \$772 million of
2 revenue is caused by the infringement. And that would
3 be --

4 **THE COURT:** But you've got -- this is where --
5 look, where the fight is, is the definition of gross
6 revenue.

7 **MR. DAMLE:** Right.

8 **THE COURT:** That's Number 1.

9 Number 2, do you agree gross revenue is
10 established by showing a causal nexus?

11 **MR. DAMLE:** It's established by showing a
12 reasonable relationship, right, which is done not through
13 statistical causal proof, which is what they're claim is,
14 and it's not shown by showing that each and every sale was
15 caused by the infringement. That's contrary to
16 Volkswagen. It's contrary to Third Circuit *Tally* case.

17 It's -- the kind of evidence that you have is
18 often just circumstantial. It's the 17 documents.

19 **THE COURT:** Does it have to be, though,
20 evidence of a causal nexus?

21 **MR. DAMLE:** It has to be evidence of -- the
22 case uses the word "causal nexus," yes.

23 **THE COURT:** Right. I just wanted to check. It
24 also uses "reasonably attributable."

25 **MR. DAMLE:** Correct.

1 **THE COURT:** That's what I was focused on.

2 **MR. DAMLE:** Right.

3 **THE COURT:** But I'm going to go back and look
4 at it. It sounds like, in discussing reasonable
5 attribuality -- whatever the correct noun would be -- it's
6 got to be a causal nexus.

7 **MR. DAMLE:** Yeah. And so I point you to the
8 Ninth Circuit's articulation of the test in the *Polar Bear*
9 case, which is a case that they cite, which is, that the
10 requirement is to provide some evidence that the
11 infringement at least partially caused the profits that
12 the infringer generated.

13 And I think there's no dispute here that IOL
14 revenues were at least partially caused by the placement
15 of a LenSx.

16 **THE COURT:** Well, let me ask you this: Could
17 you start with just the gross revenue for the company,
18 period?

19 **MR. DAMLE:** No.

20 **THE COURT:** Why not?

21 **MR. DAMLE:** Because that would include things
22 like contact -- I happen to being wearing Alcon contact
23 lenses. That would include contact lenses. It would
24 include unrelated lines of business: Solution -- that's
25 not -- that, I think, would be inappropriate. That's like

1 the Eighth Circuit --

2 **THE COURT:** Well, wait. I mean, let's just
3 assume for argument's sake the doctor's office also buy
4 contact lenses from Alcon. So why don't we count them?

5 **MR. DAMLE:** Well, I mean, if we had the
6 evidence showing that causal relationship --

7 **THE COURT:** So you do have to show some
8 evidence?

9 **MR. DAMLE:** We have to show some evidence that
10 the infringement at least partially caused the category of
11 profits that we're trying to seek.

12 **THE COURT:** Okay. So what's your evidence that
13 \$3.1 billion worth of sales is partially caused by LenSx
14 sales?

15 **MR. DAMLE:** It's all of the documents we've
16 been discussing.

17 **THE COURT:** See, those documents show, it seems
18 to me, 40 percent of the 30.1 billion -- of the
19 3.1 billion might be captured by that.

20 **MR. DAMLE:** It's at least partially.

21 **THE COURT:** So then, give me another figure.
22 Why is it more than 40?

23 **MR. DAMLE:** So if you look at -- in her
24 report -- well, first of all, we have their own analysis,
25 right, which we've used to get to the 772. That's a

1 partial -- at least partial.

2 **THE COURT:** I think if you walked in and you
3 said, "Look, I'm coming up with 772," I don't think you
4 would have a fight on your hands. I mean, you would in
5 front of the jury, but -- and they've already said they
6 wouldn't have brought a *Daubert* motion.

7 So you even agree, 772. How do you get above
8 772? What's the causal evidence?

9 **MR. DAMLE:** Again, this is all about the
10 burden, right. So can show --

11 **THE COURT:** No, no, no, no. Here's -- let's
12 just assume right now you've got the burden. See, you've
13 admitted at some level you have a burden. Because
14 you've -- even you've admitted, you couldn't waltz in here
15 and use gross revenue, period.

16 **MR. DAMLE:** Correct. Correct.

17 **THE COURT:** Right. Okay. So that means you've
18 got to show something.

19 **MR. DAMLE:** Right.

20 **THE COURT:** All right. So, and frankly, if you
21 came in here and you started at 40 percent of PC IOL
22 business revenue, I think you'd have a really good
23 argument. You know, you could say it would be a factual
24 question, the experts can duke it out, and the jury will
25 decide. I get that.

1 **MR. DAMLE:** Right.

2 **THE COURT:** And then whatever particular
3 information you came up with to get the 772 figure, the
4 same thing.

5 So we've got to get, though -- you've got to
6 get, from -- why you can posit more than 772, all right?

7 So what do you have?

8 **MR. DAMLE:** Again, I think this goes back to
9 the burdens.

10 **THE COURT:** Okay. So you're not going to
11 answer the question. Because you'll lose if you're not
12 going to answer the question.

13 **MR. DAMLE:** So if we look at Ms. Stamm's
14 report, it points to documents showing -- I don't know
15 that. I have a number bigger than 40 percent in here.

16 Well, let me -- if I may.

17 **THE COURT:** Sure. Take a moment.

18 **MR. DAMLE:** If I could just talk about one of
19 the other cases, the *Polar Bear* case.

20 **THE COURT:** Sure.

21 **MR. DAMLE:** In the *Polar Bear* case, the
22 plaintiff was seeking -- was starting -- their burden was
23 to show gross revenues of sales of wristwatches, right.
24 And they were seeking to provide evidence of the overall
25 gross revenues made by the defendant at a trade show,

1 right.

2 The trade show -- there was a trade show booth,
3 the video was playing at the trade show booth.

4 The plaintiff's expert testified that in his
5 experience, 10 to 25 percent of the trade show sales are
6 generated because of the excitement at the trade show
7 booth, right. That was the evidence.

8 But the plaintiff was not limited to presenting
9 gross revenue of 25 percent of the overall trade show
10 sales; they were able to put in the entire category, the
11 entire gross revenue from trade show sales.

12 Now, similar sort of situation here. Now, if
13 they want to take that 40 percent and say, well, that
14 shows that it's only 40 percent, that's really their
15 burden. They can use that evidence to say that that's --
16 that's their burden.

17 Again, what the Court said -- in the Ninth
18 Circuit said, was that you are able to put in gross
19 revenue for the entire category of revenue for that
20 product. That seems on all fours of what's happening
21 here.

22 **THE COURT:** Can you explain to me -- because,
23 again, I've not read the report, right -- how does your
24 expert get to 772?

25 **MR. DAMLE:** Again, this is a response --

1 **THE COURT:** I know, but just get me. If you
2 were explaining in front of the jury, where do you start
3 to get the 772?

4 **MR. DAMLE:** Do you want to...

5 **MR. MORIN:** May I -- Your Honor, may I?

6 **THE COURT:** Sure.

7 **MR. MORIN:** I think Mr. Damle is doing a
8 fabulous job, but I know that portion of the report a
9 little bit better, if that's helpful.

10 **THE COURT:** All right. That's fine. Speak to
11 the specific question.

12 **MR. MORIN:** Sure. So in Ms. Stamm's opening
13 report, she did what we viewed -- and I understand the
14 Court may question that.

15 **THE COURT:** She says 3.1.

16 **MR. MORIN:** As the Volkswagen approach,
17 basically.

18 **THE COURT:** Right. Okay. Here's what I want
19 to know is: Can she get to the 772 without starting at
20 3.1?

21 **MR. MORIN:** She does it, but it's still
22 effectively a different way of saying what portion of the
23 3.1 would be --

24 **THE COURT:** Right. I just want to know: Does
25 she get to it?

1 In other words, what I'm -- just trying to be
2 practical about this, is --

3 **MR. MORIN:** Yes.

4 **THE COURT:** -- that she's got some papers and
5 she comes up and says, well, I started at 772.

6 Let's just say, argument's sake only -- I've
7 not made up my mind. Let's say, look, there's a rational
8 basis, she could say 772 is a starting point.

9 My question is -- and I'm going to ask them the
10 same thing, is: Is it possible to even get to the 772
11 without starting at 3.1?

12 **MR. MORIN:** You can -- I don't mean to be
13 confusing, Your Honor, and I apologize in advance. You
14 can do math without taking three -- I think it's kind of
15 interesting.

16 Do you have just two minutes for me to explain
17 how she got there? Because that's --

18 **THE COURT:** That's exactly -- go ahead.

19 **MR. MORIN:** Okay. So here's what's
20 interesting. So our opening report -- not to beat a dead
21 horse -- Stamm says, here's the category. And she viewed
22 it as doing it like Volkswagen. And we instructed her.
23 We thought that's how -- what Volkswagen required.

24 **THE COURT:** Right.

25 **MR. MORIN:** Now we said the burden's on them.

1 The other side comes up -- and I don't know
2 want to be overly simplistic. Their expert says, "I'm
3 looking at accounts with the J&J product and the Alcon
4 product." It's a nice control.

5 I say, "How much Alcon IOLs do we sell?" And
6 she puts together a chart. And she says, "There's only a
7 4 percent difference, which isn't much." That's what she
8 says.

9 Now, Your Honor, it went from 10 percent to
10 14 percent. And she says that's a 4 percent difference.

11 Our point, when we went back and did the math
12 is, if you took sales tax at 5 percent and went to
13 10 percent, that's not a 5 percent difference, it's a
14 doubling, right.

15 So we made the point that that adds up, when
16 you do all the math, to \$772 million. So what we said is,
17 what she said didn't show much of anything. And what she
18 said is negligible, is actually almost a billion dollars.
19 It's \$772 million.

20 Our point on the burden -- not to beat a dead
21 horse -- was, we think we've discharged our burden at
22 \$3.1 billion. And they haven't come back and done the
23 apportionment. Our expert just used the numbers that she
24 said showed lack of causation to show what percentage of
25 the overall sales we found attributable to the IOLs.

1 I would posture one thing, Your Honor, and may
2 I just propose it because it may get to the end. We
3 could, because the 772 -- I'll answer your -- and
4 Mr. Damle was too, I think -- I'll answer your question
5 very directly.

6 We don't have a number between 772 and 3.1.
7 And our expert will not say every single lens sale that
8 was made to a LenSx account is because of that LenSx. We
9 know that's not true. Some people do some manual things.

10 We have viewed it as us meeting our burden, and
11 them not meeting their burden. So our expert would come
12 in and say it's at least 772. And the jury would be
13 legally justified at giving something between the two
14 numbers because they haven't discharged their burden.

15 If it would solve the problem and offer
16 Your Honor the right solution, we could agree that our
17 expert will say nothing more than, it's at least 772, and
18 not tell the jury it's -- \$3 billion is the correct
19 number.

20 But she should at least be able to present
21 that, because like the Audi case and every other case --

22 **THE COURT:** Present what?

23 **MR. MORIN:** Say what the number is, not as the
24 damages figure, but say, here is the circle of IOL sales.

25 **THE COURT:** Which is 3.1.

1 **THE WITNESS:** Which is 3.1. And in the pie
2 chart say -- to make it very clear to the jury, she's not
3 reaching for all of them -- it's at least the 772.

4 And our friends on the other side say, well,
5 you're just trying to get big numbers in front of the
6 jury. But if not, we're not explaining that we're
7 actually apportioning or we're taking a subset of it.

8 So if it would solve Your Honor's issue, I
9 think what we could agree is the following: She will not
10 advocate the damages are \$3.1 billion, and we won't play
11 the burden game. She will say, it's at least 772 -- using
12 the other side's numbers -- but she has to be able to
13 explain the pie chart, not as a "I could seek all of
14 this," but explaining what's going on, that it's only a
15 quarter of the sales to those IOLs, which is a factually
16 true statement, so they can understand that we're not
17 overreaching, if you will, and doing the burden game.

18 I think that would solve the problem.

19 **THE COURT:** Then, I mean, 772 is almost --
20 well, no. It's actually a lot less than 40 percent.

21 **MR. MORIN:** The 40 percent -- so there are
22 numbers that talk about a 40-percent difference. I
23 suppose we could have gone in and tried to -- it's their
24 burden, we believe. But we could have gone in and said,
25 use that 40 percent.

1 What we decided to use was, not the documents
2 that talked about a generalization of those accounts, but
3 the specific. We have customer-by-customer data, which is
4 what I'm talking about, with -- accounts with LenSx versus
5 accounts with Catalys, with J&J, and we use those actual
6 numbers to come up with our numbers, which is a lot less
7 than 40 percent. It's 25 percent or 27 percent.

8 But the underlying point to this, I am offering
9 a compromise. You seem not to be buying our argument,
10 which we believe in, but we respectfully --

11 **THE COURT:** Well, I don't know. I mean, I --
12 look, here's -- what I'm struggling with is this. I think
13 that -- it's what you encounter all the time in this these
14 cases, right. Everybody's kind of overshooting.

15 And so I think that because gross revenue is
16 undefined, it can be hard to parse when you actually apply
17 it. And so -- and I think, you know -- who was the
18 gentleman who spoke?

19 **MR. MORIN:** Oh, Mr. Damle.

20 **THE COURT:** Yeah, Damle. He did what he had to
21 do, which he had to admit -- like, I would have never
22 believed anything else he said in argument if he said, oh,
23 no, no, we can start with the gross revenue of the
24 company, right, or even the gross revenue of everything
25 sold to the practices that have a LenSx account, right.

1 Like contact lenses, right.

2 But, you know, there's -- and then I think, the
3 other side would have to -- they would have no credibility
4 if they say, well, let's not count the LenSx sales, right.
5 And the answer is, well -- but the hard part is, well,
6 what's in between.

7 **MR. MORIN:** Right.

8 **THE COURT:** And we know we have to use IOLs
9 with LenSx. Now, they don't have to be Alcon's IOLs, but
10 some IOLs have to be used with LenSx. And I don't know if
11 there's any other piece of equipment out there that has to
12 be used with the surgery, but definitely IOLs.

13 I can see the other products that Alcon might
14 be selling that would be associated with, maybe eyedrops
15 that somebody uses after they get the surgery. I'm just
16 making it up. I don't know. Right.

17 It's where do you find this gross revenue?
18 Where do you draw the line? And it's not that clear.
19 It's a hard question, right.

20 And that initially -- but you, it seems to me,
21 have to prove -- you have to put something forward. You
22 couldn't just posit all contact lenses, right. You'd have
23 to -- unless you can show a connection. So the only
24 connection you've shown is that IOLs are used in the
25 surgery. That's it.

1 **MR. MORIN:** No. Well, I think in terms of --
2 not to beat a dead horse, but we have all the documents,
3 you pointed to, that it drives it. I mean, we have
4 evidence there's a connection.

5 **THE COURT:** Oh, oh, sure. I apologize. You
6 definitely have those, but --

7 **MR. MORIN:** We have evidence there's --

8 **THE COURT:** -- they're all about IOLs.

9 **MR. MORIN:** Right. That's right.

10 And so where I would leave you -- I think it's
11 been a robust discussion. I'll answer any of your
12 questions. I mean, I think the first -- it is an
13 interesting academic question.

14 I actually think the statute is interesting,
15 and how VW answered it and how the Third Circuit and the
16 other cases have answered it, are interesting. And you
17 could see academic debate on it. Here's why.

18 We seem to have a disagreement on what that
19 nexus has to be to. Does it have to be that you show the
20 subset of IOL sales, that actually were attributable, were
21 the extra sales as a result of LenSx in Step 1, where we
22 identify the gross revenues, or is it enough to do the
23 category.

24 And respectfully, Your Honor, I know you see
25 the Audi case is different in the sense that -- I mean,

1 it's a very complicated -- you know, putting all these
2 together -- but in the sense that this is the convoyed
3 thing, and the advertisement was about the TT rather than
4 about an accessory to the TT.

5 But one thing I think that dispositively tells
6 us is, whatever the causal nexus needs to be, it doesn't
7 have to be onsie-twosie, and it doesn't have to carve up
8 that category. They say, you bring in the whole category
9 and then it shifts to the other side.

10 So the causal nexus does not have to be,
11 whether it's 100 percent or 80 percent or 60 percent of
12 whatever you're dealing with. The courts make that very
13 clear.

14 The 772, if you will, gets to what you would do
15 to parse it up in Level 2. But the point is, they never
16 did that on the burden shifting. We came back did that
17 with the data that they gave us afterwards.

18 Whatever the case, we think the proper approach
19 is -- what we were planning to do, is to say, it's at
20 least 772. And they haven't met their burden, so it could
21 be up to \$3.1 billion.

22 If Your Honor is less comfortable with that in
23 viewing all the case law, I am offering the compromise
24 that we will say, "Here is the overall category." We have
25 to be able to quantify it to explain the context of what

1 we've done.

2 And that when we come and they say we're being
3 unreasonable, we could say, "It's only a quarter of these
4 sales that we're asking for damages on, and our witness
5 just say it's at least 772."

6 But the point is, she would not then put out
7 the number and say, "Jury, I believe it's \$3.1 billion."

8 **THE COURT:** Okay. Thank you.

9 **MS. HEFFERNAN:** Okay. So I'm going to do my
10 best to kind of pick my way through the questions you
11 asked my colleagues.

12 I do have Ms. Stamm's schedule from her
13 report -- I can hand it up to Your Honor -- where she
14 calculates the \$772 million.

15 She does not start with \$3.1 billion; instead,
16 she starts with, as I mentioned earlier, this difference
17 in penetration of IOLs into accounts that have an Alcon
18 phaco and Alcon LenSx, versus accounts that have an Alcon
19 phaco and Catalys, J&J Catalys.

20 May I hand it up? Just so can you see there's
21 no \$3.1 billion.

22 **THE COURT:** Right. But let's just start,
23 though -- let's start with the proposal on the table,
24 which is, they don't mention 3.1, and they say starting
25 point, you know -- it's 772, up to -- I guess they would

1 mention 3.1 because they want to put what the cap would
2 be.

3 **MS. HEFFERNAN:** So that wouldn't be acceptable
4 to us.

5 **THE COURT:** Yeah. You know, here's the thing:
6 If she had started with 40 percent of 3.1 --

7 **MS. HEFFERNAN:** May I correct Your Honor on
8 that?

9 **THE COURT:** Yeah.

10 **MS. HEFFERNAN:** It's not 40 percent on the 3.1.
11 The document that Your Honor's referring to talks about
12 40 percent of PC IOLs --

13 **THE COURT:** Right.

14 **MS. HEFFERNAN:** -- presbyopia-correcting IOLs.

15 **THE COURT:** Right. Which is funny. I actually
16 Googled it to figure out what the heck it is, and I guess,
17 you know, it's not record evidence, but I assume it's a
18 subset of IOLs.

19 **MS. HEFFERNAN:** It is a subset of IOLs.

20 **THE COURT:** Right.

21 **MS. HEFFERNAN:** But that would be only
22 40 percent of those PC IOLs that are sold into a LenSx
23 account, which is not \$3.1 billion.

24 **THE COURT:** Right.

25 **MS. HEFFERNAN:** And then they -- but they don't

1 just seek infringing indirect profits on PC IOLs. They
2 seek them on all advanced technology IOLs and all
3 monofocal IOLs.

4 So it's not 40 percent of 3.1 billion.
5 40 percent in that document is 40 percent of PC IOLs that
6 are sold into a LenSx account.

7 **THE COURT:** Okay.

8 **MS. HEFFERNAN:** So you can't -- one cannot
9 apply 40 percent to 3.1 billion.

10 **THE COURT:** All right. There's also, though,
11 in the bottom left of the same PowerPoint slide,
12 there's -- it says, "22 percent of LenSx accounts,
13 percentage of Alcon IOL." It's not limited to PC IOLs.

14 So 22 percent, which is not that far off from
15 772 million. Right. 772 million is going to be, I don't
16 know, a little bit under 25 percent, right?

17 **MS. HEFFERNAN:** I think that's fair. But I'm
18 not sure what the question is.

19 **THE COURT:** Let's just suppose that's what they
20 started with. Let's suppose -- let's suppose they had
21 their expert take the approach that LenSx -- Alcon's own
22 internal documents acknowledge 22 percent correlation, or
23 actually -- and in fairness for them, I think that would
24 be, in my mind, sufficient to put in front of a jury as
25 causation -- but 22 percent of all Alcon IOL sales go to

1 LenSx accounts.

2 **MS. HEFFERNAN:** So what their expert did was
3 look at the document Your Honor's looking at, did not use
4 that number, used a different number from that document,
5 to get to her \$511 million.

6 **THE COURT:** Okay.

7 **MS. HEFFERNAN:** We did not move on that number.

8 **THE COURT:** Right.

9 **MS. HEFFERNAN:** Yeah.

10 **THE COURT:** Hold on. I'm just asking though,
11 what if she had said, "My starting point is 22 percent of
12 the \$3.1 billion"?

13 **MS. HEFFERNAN:** I haven't done the analysis for
14 that, and whether we would, at that point, have brought a
15 different *Daubert* motion before the Court. I haven't done
16 the analysis, and our expert hasn't done it, and neither
17 has theirs. So I know that's dissatisfying, but I'm not
18 sure I can answer that question.

19 But may I add, though, Your Honor, you asked a
20 question about -- you know, this is, in some sense, a line
21 drawing exercise; where do we draw the line?

22 **THE COURT:** Right.

23 **MS. HEFFERNAN:** Well, we draw the line -- they
24 have drawn the line, beyond LenSx, to also include the
25 soft-fit patient interface which does have a one-to-one

1 correlation with LenSx devices. You cannot use a
2 patient --

3 **THE COURT:** Hold on.

4 You didn't move to exclude anything about soft
5 fits.

6 **MS. HEFFERNAN:** Correct. And what I'm doing
7 is, I'm letting Your Honor know what's in play. You
8 asked.

9 **THE COURT:** Oh.

10 **MS. HEFFERNAN:** This is a line-drawing
11 exercise, and I'm letting the Court know, a little bit,
12 where those lines have been drawn.

13 So they are seeking profits on placements of
14 LenSx devices. They are seeking indirect profits on every
15 patient interface used with a LenSx whenever it's run.
16 That is not the subject of our *Daubert* motion.

17 They are also seeking indirect profits on all
18 of the service revenue from servicing LenSx devices. That
19 is not the subject of our motion.

20 Finally, they are also seeking indirect profits
21 on sales of Verion digital marking machines which help to
22 implant IOLs after a LenSx is used. We are not seeking to
23 exclude that.

24 So as far as line-drawing exercises go, there
25 is a big line that's been drawn around all of that

1 equipment. That is not the subject of our *Daubert*. The
2 only subject of our *Daubert* is the IOLs.

3 And more specifically, this jump from 511, or
4 alternatively, 772, which Ms. Stamm has some evidence
5 for -- we disagree with it, but she has some evidence for
6 it -- jumping from that to the 3.1 billion that she has
7 absolutely no evidence of a causal nexus for.

8 And the case law is clear, that you need to
9 have a causal nexus. You look at *Leonard v. Stemtech*,
10 which is a Third Circuit case. And --

11 **THE COURT:** I'm okay with the causal nexus.
12 They don't dispute it, so...

13 **MS. HEFFERNAN:** Okay. And then also the PP --
14 the *Polar Bear*, sorry -- the *Polar Bear* case, which I
15 think is a Ninth Circuit case --

16 **THE COURT:** It is.

17 **MS. HEFFERNAN:** -- in that case, the Court said
18 it was okay for them to go after indirect profits based on
19 sales that were made at the trade show, where it was
20 undisputed that customers at the trade show saw the
21 commercial and it participated in their purchasing
22 decision.

23 But then they, "they" the plaintiff, went after
24 more than that, and said, Okay. Well, we have had a lot
25 of success with this advertising campaign. We think it

1 has an effect, actually, on retail sales outside of the
2 trade show context. Let's go after retail sales.

3 And *Polar Bear* Court said, "There must be a
4 demonstration that the infringing acts had an effect on
5 profits before the parties can wrangle about
6 apportionment."

7 So you've got to do causal nexus before you get
8 to apportionment.

9 "To recover indirect profits under its theory,
10 brand premium theory, *Polar Bear* shoulders the burden of
11 demonstrating that the infringement is causally linked to
12 the revenues from the sales of all expedition watches."

13 So they need to show a connection to all IOLs
14 if they want to try to get indirect profits on them. Not
15 just a category or an idea, but they have to show a causal
16 nexus to all.

17 And, in fact, I think it was -- I think it was
18 the *Polar Bear* case that went on to say, "The whole point
19 of the causation element of the statute serves as a
20 logical parameter to the range of gross profits. This
21 rule of reason obviates a great deal" -- sorry -- "a good
22 deal of mischief in claiming profits beyond what might be
23 attributable to the infringement."

24 And that is the *Polar Bear* case at 711.

25 And that's exactly what we have here. From

1 772 million, up to 3.1 billion, that's the mischief. They
2 have shown a nexus of some kind, a correlation to 511 and
3 772, but absolutely nothing beyond that.

4 **THE COURT:** Do you know, was 504(b) in
5 existence before source code was deemed to be
6 copyrightable?

7 **MS. HEFFERNAN:** I do not, standing here, know
8 the answer to that question.

9 **THE COURT:** I mean, I'm going to guess it was,
10 but do you know?

11 **MS. HEFFERNAN:** I would assume it was. But I
12 can't answer that question that I know it was.

13 **MR. MORIN:** Sy's not --

14 **MR. DAMLE:** Huh-huh. Yeah.

15 **MS. HEFFERNAN:** Oh, Sy, I forgot you're in the
16 room.

17 **MR. DAMLE:** Yes. The answer is yes. It was
18 copyrighted before.

19 **THE COURT:** Long before. I'm going to guess
20 it's been a -- probably the common law, or -- but it's
21 certainly, it's been --

22 **MR. DAMLE:** Well, computer programs were
23 recognized as copyrightable before 1976, which is when
24 this provision was adopted.

25 **THE COURT:** Oh, so wait. You're saying this

1 provision did not predate source code --

2 **MR. DAMLE:** No. This provision postdated that.

3 **THE COURT:** Postdated. I didn't hear you
4 correctly.

5 **MR. DAMLE:** Sorry. The provision was adopted
6 after the recognition of computer programs as being
7 copyrightable.

8 **THE COURT:** In the statute? Okay.

9 **MR. DAMLE:** It was common -- it was under the
10 1909 Act, which didn't use the word "computer program."
11 But it was understood that computer programs in case law,
12 was understood that computer programs were protectable
13 under copyright law prior to 1976. This provision was
14 adopted by its terms in 1976.

15 **THE COURT:** All right. Anything else?

16 **MS. HEFFERNAN:** Only if Your Honor still has
17 questions.

18 **THE COURT:** Well, I have lots of questions. I
19 think a -- it's not clearcut. And that's why I was trying
20 to come up with something practical.

21 **MS. HEFFERNAN:** Thank you, Your Honor.

22 **THE COURT:** But I'll just think more about it.
23 It's still not clear to me what the right answer is. I
24 don't have a very strong conviction about gross revenue,
25 how it's defined.

1 So I'll think more about it. All right?

2 Thanks.

3 **MS. HEFFERNAN:** Thank you.

4 **THE COURT:** I don't know if it's worth doing
5 the second motion. I mean, I've got a sentencing at 2:30,
6 or rather, a plea hearing. I guess we could -- and I
7 thought that the -- basically, how I decided the first
8 motion would influence the second.

9 Am I wrong on that?

10 **MR. MORIN:** Your Honor, I don't think that
11 whatever you decide in the first one would affect the
12 second. IOLs are in play.

13 **THE COURT:** All right. Well, then walk me
14 through them. Whoever's going to argue, let's go.

15 **MR. MORIN:** My colleague, Ms. Blitzer, I think
16 it's the first time before this Court.

17 **THE COURT:** All right. Thank you.

18 **MS. BLITZER:** Good afternoon, Your Honor.
19 Rachael Blitzer for plaintiff.

20 I have brought some slides today to help -- to
21 aid with my discussion. And I'll try to keep this brief.

22 The reason for J&J's *Daubert*, Number 3, is
23 Ms. Davis' attempt to opine on hundreds of millions of
24 dollars in IOL expenses through a single sentence in a
25 footnote. And that single sentence adopts a single

1 forecast in a company's presentation. And she uses this
2 presentation and that one line to try to deduct off of the
3 top of Alcon's IOL revenue, 62 percent of all expenses
4 across the board for a period of about 12 years.

5 We've listed, in our papers, a number of
6 reasons why this is inappropriate and why this should be
7 excluded under *Daubert*. I'll quickly talk through a
8 couple of them.

9 The first is, this is contrary to copyright
10 law. And the second is, that this is unreliable and
11 untestable and that can't be cured here by
12 cross-examination.

13 So talking quickly about the law. The law
14 requires, here, that a defendant identify its costs that
15 are deductible when a plaintiff is seeking profits.

16 You read Section 504(b) earlier.

17 And the cases make very clear that only those
18 expenses that are proven with some specificity to relate
19 to the infringement are deductible. And a defendant can't
20 meet this burden by providing general statements of broad
21 categories of expense. They really have to identify each
22 item that they intend to deduct.

23 It's a very exacting standard, and it's one
24 that Ms. Davis completely fails to meet.

25 She needs to identify all of the different

1 expenses that she seeks to deduct on an individual level.
2 So the costs to make the IOLs, the cost to market them, to
3 ship them, and a host of others. But, instead, her entire
4 analysis is contained here in the footnote that you see on
5 the screen, where she performs no actual analysis, but
6 just adopts a profit margin number from an Alcon capital
7 allocation.

8 Now, for comparison sake, let me compare that
9 to the analysis that Ms. Davis did in her work to deduct
10 costs for LenSx, also at issue in the case.

11 When doing that, she spoke about it in her
12 report over the course of four different pages, and she
13 included five different schedules listing out all of the
14 different expenses that she thought were appropriate to
15 deduct. They're all there line by line. This includes
16 citations to over a dozen different Alcon financial
17 documents, like spreadsheets and conversations with Alcon
18 personnel.

19 This is the analysis done for LenSx, as
20 compared to the single footnote that I showed you earlier.
21 And I don't even think I'm quite at the end of it, but I
22 will keep moving ahead.

23 In addition to not meeting the standards for
24 proving deductions under the Copyright Act, the cross-exam
25 is also insufficient to address the reliability problems

1 with this analysis. That's because Alcon and Ms. Davis
2 have not provided any of the documents that underlie the
3 38-percent figure. That data has not been provided.

4 Now, Alcon is a publicly traded company. They
5 make -- they have a multibillion dollars IOL business.

6 I don't know why this single document is the
7 one that they've provided to their expert, but surely they
8 have troves and troves of financial information
9 documenting the expenses that go into their IOL business.

10 So here we have the 38-percent figure that
11 Ms. Davis relies on. And I don't know if that 38-percent
12 figure, if it's based on something or if it's based on
13 nothing. But either way, Alcon has a big problem on their
14 hands. Because if that 38-percent figure is based on
15 something, if it's based on real, hard data, then there
16 where is that data? Why has that data not been produced
17 in this case? What does that data show? What expenses
18 are included in that data?

19 We have no idea. Even Ms. Davis has no idea.
20 She asked Alcon for that information and they didn't give
21 it to her.

22 Now, if that 38-percent number, on the other
23 hand, is not based on data, well, of course, that's
24 inherently a huge problem in itself. That it is
25 completely unreliable. But either way, Alcon cannot meet

1 its burden simply with this number. And because we don't
2 have the information that backs up that number, we can't
3 meaningfully cross Ms. Davis on it.

4 So if Ms. Davis were to come into court and
5 opine ipse dixit that 62 percent of the Alcon's IOL
6 revenue is deductible, we have no way to cross that. We
7 have no way to prove that she's wrong, because we have no
8 seen the documents underlying it. And even she has not
9 seen the documents underlying it.

10 Now, this is exactly that *Daubert* was intended
11 to prevent.

12 In the interest of time, I'll wrap it up. But
13 I will just note that, in addition to not being sufficient
14 under the copyright law, this document is unreliable on
15 its face. It's identified as preliminary. There is
16 language earlier in the report indicating that this report
17 is not to be used for financial reporting. And moreover,
18 it's a forecast. This doesn't even purport to be an
19 actual profit margin.

20 Now, Alcon has made the case that there's
21 another document out there that they can use to
22 substantiate this number. That's something that we
23 learned for the first time in Ms. Davis' deposition. That
24 was not included in her report. I showed you the entirety
25 of her position on my first slide.

1 But regardless, I want to make very clear, that
2 that other document that's supposedly referenced, that
3 document does not substantiate a 38-percent profit margin.
4 That document shows much higher profit margins, which
5 means much smaller deductions.

6 All that document is used for is to say, okay,
7 well, for the costs considered in that document, those
8 cost remain steady over time. So therefore, we can say
9 that the much bigger costs, addressed in this 38-percent
10 document, remain steady over time. But that doesn't make
11 any sense. There are many more costs, obviously, included
12 in this 38-percent figure. That spreadsheet cannot speak
13 to whether these remain constant.

14 And I want to leave you with one last thought
15 on our inability to properly cross-examine here.

16 I walked you earlier through Ms. Davis'
17 deduction of specific expenses, which is required under
18 the law. And going through the expenses, she deducts
19 many -- and then there are also expenses on Alcon's books
20 that she says, "These are inappropriate. These are not
21 attributable to LenSx. I'm not going to include them in
22 my analysis."

23 Now, because we were able to identify all of
24 the expenses that she did opt to include, we had our own
25 expert opine on them as well. And she pointed out that

1 some of those were inappropriate deductions, and that,
2 therefore, they should not have been included in Stamm's
3 deductions.

4 We then had an opportunity to depose -- I'm
5 sorry, in Davis' deposition -- we, then, had an
6 opportunity to depose Ms. Davis on that question and say,
7 "Is it true that these were inappropriate deductions?"

8 And she said, "Yes. You're right. These were
9 inappropriate deductions. I will remove them from my
10 calculations when I update them before trial."

11 But we don't have the opportunity to do that
12 with this 38-percent figure. It just stands out there on
13 its own with no support, no analysis, and Ms. Davis
14 reports to use it to deduct hundreds of millions of
15 dollars.

16 **THE COURT:** What's the theory then? Why
17 doesn't it comport -- it's a Rule 702 motion, right?

18 **MS. BLITZER:** Yes.

19 **THE COURT:** All right. So what is it that
20 violates 702?

21 **MR. DAMLE:** Well, completely unreliable.

22 **THE COURT:** Is there anything else?

23 **MS. BLITZER:** No. You know, in their papers
24 Alcon has argued that it need only meet the fit
25 requirement, that it need only be something that's helpful

1 to the jury. That's not the only element under 702 in
2 *Daubert*. There's also the requirement of qualification,
3 and most importantly, the requirement of reliability.

4 And this is not only unreliable, but it's not
5 amenable to cross-examination. We can't fix this on cross
6 because we haven't the seen the documents and Ms. Davis
7 hasn't seen the document.

8 **THE COURT:** Okay. So it's reliability -- lack
9 of reliability?

10 **MS. BLITZER:** Yes.

11 **THE COURT:** All right. Thanks very much.

12 **MS. BLITZER:** And contrary to law.

13 **THE COURT:** I don't think the rule says
14 anything about contrary to law, does it? I think that's
15 reliability.

16 **MS. BLITZER:** Well, under 702, definitely
17 reliability.

18 **THE COURT:** Okay. Thank you.

19 **MS. HEFFERNAN:** The case law says nothing about
20 the type of documents an expert can use to prove
21 deductions. And there's the *Counsulnet* case that we
22 cite --

23 **THE COURT:** You know, I've got to -- look, I
24 will be -- honestly, I didn't read the papers.

25 **MS. HEFFERNAN:** Okay.

1 **THE COURT:** Just so you'll know because of the
2 rush we're in, I studied at length the first *Daubert*
3 motion, saw that the -- I asked for oral argument.

4 If you look at my oral order, what it says is,
5 you should also be prepared. And the reason why I said
6 that was because the other motion had to do with IOLs, and
7 so I assumed some causal connection. That's -- to be
8 upfront, that's what I did.

9 **MS. HEFFERNAN:** There's some correlation, but
10 no causal --

11 **THE COURT:** You needed -- you needed to be
12 prepared, and you all were and did very nice arguments.
13 And that was a very nice argument, especially given it's
14 your first.

15 So, just to be candid, so but it's worthwhile.
16 It helps me. And I've got another seven minutes before I
17 go into another proceeding.

18 So, you know, I mean, I can say it was pretty
19 good argument, and it's going to certainly make me go back
20 and read this motion carefully. I mean, I've got some
21 concerns.

22 These are predictive data?

23 **MS. HEFFERNAN:** Well, it's -- this is -- yes,
24 this predicts the deductions for IOLs in 2021, but based
25 on evidence from 2018, 2019 that formed the basis of this

1 document.

2 **THE COURT:** Okay. Were there documents that
3 were produced that address those prior years?

4 **MS. HEFFERNAN:** So those documents -- they did
5 not ask for those documents. Can I just let the Court
6 know how this kind of bubbled up during the course of
7 discovery?

8 **THE COURT:** Sure.

9 **MS. HEFFERNAN:** So on February 14, 2022, just
10 two weeks before the close of extended fact discovery, was
11 the first time J&J told Alcon it was going to go after
12 disgorging IOLs. It's the first time we learned of it.
13 So we scrambled and got documents for -- as best we could,
14 for Ms. Davis in terms of IOLs and deductible expenses.

15 As I mentioned during our first argument,
16 neither company tracks expenses on a product level. So
17 not on an IOL level. So we went to Alcon Finance and
18 said, "Do you have anything to show expenses for IOLs?"

19 And they said, "We did a one-off deep dive with
20 McKinsey & Company," which is a consulting company, "and
21 they prepared this presentation," which is at -- let's
22 see. I think it's Exhibit 40. I'll get it up.

23 But in any event, the presentation was prepared
24 in conjunction with McKinsey & Company --

25 **THE COURT:** Is that part of the presentation?

1 **MS. HEFFERNAN:** It is. It is part of it.

2 **THE COURT:** Okay. "This," so the record
3 reflects, is the slide that's on the screen which appears
4 to the J&J Exhibit 22-A at Page 8.

5 **MS. HEFFERNAN:** That's right.

6 And in the Alcon responsive brief, we actually
7 have the entire presentation. And that is at -- I'm
8 sorry, Exhibit 48 to Alcon's responsive brief.

9 And the cover page shows that it is a capital
10 allocation presentation. And then below that it says "ECA
11 Discussion Document." That's the executive committee of
12 Alcon. It's made of the top six or seven folks of Alcon:
13 The chief executive officer, the chief financial officer,
14 et cetera.

15 This document was prepared for that committee
16 to decide -- after the spin of Novartis, Alcon was spun
17 off from Novartis in 2019 -- based on Alcon's prior
18 financial performance, how are we going to allocate our
19 capital going forward to get the highest return on
20 invested capital?

21 And so they looked at -- "they," meaning
22 McKinsey and the financial folks at Alcon -- looked at
23 past performance. Here's what we invested in the past.
24 How did it do? What was our return? Do we want to
25 continue investigating internally? Do we want to start

1 acquiring external companies the pharma business because
2 there's a higher return on invested capital there?

3 That's what this entire presentation, in
4 Exhibit 40 to Alcon's answering brief, discusses. And it
5 is one of most reliable presentations because Alcon's top
6 executives are making business -- forward-looking business
7 decisions based on past historical financial performance
8 on how to investigate their capital.

9 Ms. Davis had a conversation with
10 Andrew McDonald -- she testified to it at her
11 deposition -- about this document and what went into
12 making up this document and believed, based on her expert
13 experience, totally reliable to use this.

14 **THE COURT:** And who's Andrew McDonald again?

15 **MS. HEFFERNAN:** He is part of the finance team
16 at Alcon.

17 **THE COURT:** All right. Anything else?

18 **MS. HEFFERNAN:** Just briefly.

19 So I heard a pretty good cross-exam of
20 Ms. Davis in the argument just now. But the questioning
21 of Ms. Davis on this document at her deposition was maybe
22 two and a half pages of questions.

23 So they had their opportunity to get additional
24 information about this document and its reliability from
25 Ms. Davis at her deposition and decided not to.

1 Now, if the -- anybody wants -- you know,
2 we'll -- we can bring a witness who can testify more about
3 it at trial, but Ms. Davis had these conversations and
4 absolutely trusts in the reliability of this presentation.
5 She used a second document that was referred to during the
6 argument to corroborate the evidence in this document.

7 That second document is one that is produced --
8 prepared every single year of Alcon's existence from --
9 prior to 2010, and it's going to go for a long time
10 because it's required to be prepared by the Swiss and U.S.
11 tax authorities.

12 Alcon has Swiss connections. There's Swiss
13 tax. They want their tax dollars; the U.S. wants its tax
14 dollars. And so there is an allegation of revenue that is
15 performed each and every year, because that is subject to
16 an audit by the Swiss and U.S. tax authorities.

17 Ms. Davis had a conversation with
18 David Chamberlain, who is in the tax department at Alcon,
19 about that corroborating document and felt that document
20 was sufficiently reliable for her to corroborate this
21 number -- this number, the 38 percent that we see on the
22 slide here -- because it includes also some more
23 deductible expenses beyond what was in the Chamberlain
24 document; namely, R&D.

25 And so Ms. Davis felt that this 38-percent

1 number was more inclusive of all of Alcon's deductible
2 expenses for IOLs and that's why she used it.

3 **THE COURT:** All right. So this is the only
4 document she relied on, the Exhibit 22-A here, right?

5 **MS. HEFFERNAN:** Well --

6 **THE COURT:** Except for, she then corroborated,
7 I guess, you're saying, with this Chamberlain document.

8 **MS. HEFFERNAN:** I would just make a slight
9 correction to that --

10 **THE COURT:** Yeah.

11 **MS. HEFFERNAN:** -- and say it's the document at
12 Exhibit 48 to Alcon's answering brief, because that's the
13 full document. This is just an excerpt.

14 **THE COURT:** Fair enough. Okay.

15 **MS. HEFFERNAN:** But, yes. So she relies on
16 this document --

17 **THE COURT:** This document we're going to call
18 the McKinsey presentation?

19 **MS. HEFFERNAN:** Yes.

20 **THE COURT:** Okay. And then the other document
21 is --

22 **MS. HEFFERNAN:** Let's call it the --

23 **THE COURT:** The Chamberlain document.

24 **MS. HEFFERNAN:** The Chamberlain document.

25 **THE COURT:** Okay. Were the Chamberlain

1 document and the McKinsey presentation produced in
2 discovery?

3 **MS. HEFFERNAN:** Yes.

4 **THE COURT:** Okay. Were they produced prior to
5 her giving this opinion?

6 **MS. HEFFERNAN:** They were -- yes, they were
7 produced prior to her giving the opinion. The document
8 that we're -- the McKinsey document was produced prior to
9 the close of fact discovery.

10 And the Chamberlain document was produced just
11 prior to Ms. Davis serving her rebuttal report in which
12 she addressed Ms. Stamm's IOL disgorgement analysis,
13 because that was the first time Alcon knew they were going
14 to be going after IOLs.

15 **THE COURT:** That's the Chamberlain document?

16 **MS. HEFFERNAN:** That's correct.

17 **THE COURT:** So McKinsey was produced before the
18 end of fact discovery?

19 **MS. HEFFERNAN:** Yes.

20 **THE COURT:** Chamberlain document was produced
21 somewhere between the responsive expert brief from Stamm
22 and reply brief by Davis.

23 **MS. HEFFERNAN:** Between Stamm's opening brief
24 and Davis' rebuttal brief.

25 **THE COURT:** Okay. All right.

1 **MS. BLITZER:** Your Honor, if I can just
2 correct --

3 **MS. HEFFERNAN:** Or rebuttal report, I should
4 say.

5 **MS. BLITZER:** Yeah, that document was provided
6 at the exact same time as the rebuttal report.

7 **MS. HEFFERNAN:** Yeah, it was -- I think it was
8 the day of, the day before of, but it was produced with
9 her rebuttal report. I wasn't trying to take liberties
10 there. I think I said that it produce...

11 **THE COURT:** You said "before," which is a
12 little different than "with."

13 **MS. HEFFERNAN:** Well, I don't know if it was
14 hours before or what, but it was produced, I'll say, in
15 conjunction with her rebuttal report.

16 **THE COURT:** Well, that sounds more accurate.
17 Okay.

18 **MS. HEFFERNAN:** And then, also, the
19 conversations that she had with Mr. McDonald and
20 Mr. Chamberlain.

21 **THE COURT:** Right. Okay.

22 So the first you ever hear of the 38 percent is
23 in the rebuttal report?

24 **MS. BLITZER:** No. The first that we ever hear
25 of the spreadsheet that -- at Ms. Davis' deposition that

1 she tries to identify as corroborating -- or really, I
2 think the "corroborating" language comes from the briefs,
3 not from Ms. Davis.

4 The first time we hear of that is in connection
5 with this rebuttal report. And it wasn't provided.

6 **THE COURT:** I guess -- I'm confused then. I
7 thought I asked the question.

8 The first you ever heard about it is with the
9 rebuttal report. You're saying that it's --

10 **MS. BLITZER:** No. Not the 38-percent figure,
11 the -- this Excel spreadsheet that they're trying to
12 identify as confirming the 38-percent number. I'm a
13 little confused now, too.

14 **THE COURT:** All right. So let's step back.
15 You're telling me that Davis applies a
16 38-percent deduction based on the McKinsey report.

17 **MS. BLITZER:** Yes, a 62 percent deduction.

18 **THE COURT:** Sixty-two. The opposite, right.
19 Okay.

20 So my question is: When did you first hear
21 about that?

22 **MS. BLITZER:** This document was --

23 **THE COURT:** Not the document. When did you
24 first hear that Davis is opining "I'm going to reduce by
25 62 percent"?

1 **MS. BLITZER:** In her rebuttal report.

2 **THE COURT:** Okay. I will have to look at the
3 transcript.

4 So that's the first you hear about it. All
5 right. So then, you question her, right, in a deposition?

6 **MS. BLITZER:** Yes.

7 **THE COURT:** All right. And so -- and she's
8 only relying on two documents, both of which were produced
9 to you no later than her rebuttal report.

10 **MS. BLITZER:** Yes.

11 **THE COURT:** All right.

12 **MS. BLITZER:** That's right.

13 **THE COURT:** Okay. And so the issue is whether
14 relying on a McKinsey presentation to -- is it disputed,
15 that the presentation was given to the CEO and the top
16 executives of Alcon?

17 **MS. BLITZER:** That's not in the record. I
18 don't know who it was given to. I learned today --

19 **THE COURT:** You could have asked that at the
20 deposition. Was it asked at deposition?

21 **MS. BLITZER:** We could have asked who it was
22 given to, that's right.

23 **THE COURT:** Right.

24 **MS. BLITZER:** And that question was not asked
25 at the deposition. But also, we haven't seen -- this data

1 was provided to McKinsey, right. This is a 2020 -- this
2 litigation was already going on in July of 2020 when this
3 was created.

4 **THE COURT:** Did you ask for -- did you make a
5 discovery request for that material?

6 **MS. BLITZER:** Oh, we've had discovery requests
7 and discovery meet and confers on IOL financial
8 information going all the way back to August of 2021. We
9 didn't say, is there a McKinsey presentation --

10 **THE COURT:** So I asked you though -- see, this
11 is the thing. This is why you've got to be careful.

12 I asked you, I said: What's the basis of the
13 motion?

14 And you said 702.

15 And then I asked you: What in 702?

16 You said reliability.

17 So you didn't say it's a Rule 26 motion. You
18 didn't say there's any other justification to preclude
19 this evidence from coming in. So it's going solely to
20 reliability.

21 **MS. BLITZER:** It is going solely to
22 reliability, but it's also -- I also explained that it's
23 contrary to law. And this is their burden.

24 This is -- as you read earlier in the statute,
25 this is very clearly Alcon's burden to prove their

1 deduction. These are real, hard numbers. They've paid
2 these costs over the last decade. And the only evidence
3 that they can provide for it is this McKinsey spreadsheet.

4 If you would let me just point to one more
5 thing --

6 **THE COURT:** No. I'm not going to because --
7 well, I'll read the briefs. I'll take a look at what you
8 said. So I'll focus on that, actually, when I do the
9 briefs, which is, is there something that the law requires
10 to be more specific than this? In which case, maybe you
11 have a good argument.

12 But if there's not cases that say -- that
13 require that these deductions contemplated by 504(b). You
14 have to be very, very specific. And given that the
15 statute doesn't define "gross revenue," I have to say,
16 going into it, I'll be surprised.

17 But I'll look at it with an open mind, and I'll
18 decide both motions on the eve of trial, but as soon as I
19 can.

20 All right. Now, we've got a pretrial
21 conference coming up. When's that?

22 **MS. HEFFERNAN:** Next week.

23 **THE COURT:** Next week. And we'll see what I
24 can do, if I can get a decision in by then. It's at 3:00?

25 **MS. HEFFERNAN:** It's 3:00 to 5:00 -- oh, well,

1 3:00 to -- whenever the Court will like to end it.

2 **THE COURT:** I can't imagine we'll finish before
3 5:00. And then I just saw some other papers. I forgot
4 you guys have another set of lawsuits going on in front of
5 me.

6 **MR. LOCASCIO:** There are. There's the patent
7 issues that were long-term stayed in this case.

8 **THE COURT:** Right.

9 **MR. LOCASCIO:** And then there's the separate
10 case with two patents, which I believe is still on a
11 motion -- a 101 motion from the other side that's just
12 been on ice since then.

13 **THE COURT:** And I'm going to just leave those
14 to, let's get this trial done and then we will decide
15 those.

16 **MR. LOCASCIO:** How we proceed then.

17 **THE COURT:** All right. That's what we will do.
18 So you guys can also focus on trial prep.

19 **MR. LOCASCIO:** Thank you, Your Honor.

20 **THE COURT:** All right.

21 **MR. MORIN:** Thank you, Your Honor.

22 **THE COURT:** Anything else?

23 **MR. LOCASCIO:** No. We'll see you next
24 Wednesday.

25 **MR. MORIN:** See you next Wednesday.

1 **THE COURT:** Next Wednesday. All right. As
2 always, I enjoyed the lawyering. Thank you very much.

3 (The proceedings concluded at 2:30 p.m.)
4
5

6 CERTIFICATE OF COURT REPORTER
7

8 I hereby certify that the foregoing is a true and
9 accurate transcript from my stenographic notes in the
10 proceeding.
11

12 /s/ Bonnie R. Archer
13 Bonnie R. Archer
14 Official Court Reporter
15 U.S. District Court
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<p>Case 1:20-cv-00842-CJC-JLH Document 517-1 Filed 01/17/23 Page 81 of 92 PageID #: 31065</p> <p>MR. BLUMENFELD: [2] 3/7 3/12 MR. DAMLE: [55] 25/15 25/18 26/8 26/13 26/18 27/18 27/23 28/1 28/10 28/13 28/15 30/4 30/22 30/25 31/2 31/17 31/21 32/5 32/15 32/21 32/24 33/2 33/5 33/21 33/25 35/7 35/11 35/21 35/25 36/2 36/7 36/19 36/21 37/5 37/9 37/15 37/20 37/23 38/9 38/16 38/19 39/1 39/8 39/13 39/18 39/21 40/25 41/4 57/14 57/17 57/22 58/2 58/5 58/9 65/21 MR. LOCASCIO: [5] 79/6 79/9 79/16 79/19 79/23 MR. MORIN: [22] 28/4 41/5 41/7 41/12 41/16 41/21 42/3 42/12 42/19 42/25 44/23 45/21 46/19 47/7 48/1 48/7 48/9 57/13 59/10 59/15 79/21 79/25 MR. SHAW: [1] 3/14 MS. BLITZER: [21] 59/18 65/18 65/23 66/10 66/12 66/16 74/1 74/5 74/24 75/10 75/17 75/22 76/1 76/6 76/10 76/12 76/17 76/21 76/24 77/6 77/21 MS. HEFFERNAN: [130] THE COURT: [226] THE WITNESS: [1] 45/1</p>	<p>1</p> <p>10 [1] 40/5 10 percent [2] 43/9 43/13 100 percent [3] 18/20 30/23 49/11 101 motion [1] 79/11 12 years [1] 60/4 13 [1] 1/13 13 billion [1] 27/24 14 [1] 68/9 14 percent [1] 43/10 17 [2] 29/23 35/18 1909 [1] 58/10 1976 [3] 57/23 58/13 58/14 1:00 [2] 1/13 3/4</p> <p>2</p> <p>20-842-CFC [1] 1/6 2010 [1] 71/9 2016 [1] 20/9 2018 [1] 67/25 2019 [2] 67/25 69/17 2020 [2] 77/1 77/2 2021 [2] 67/24 77/8 2022 [1] 68/9 2023 [1] 1/13 22 percent [5] 52/12 52/14 52/22 52/25 53/11 25 percent [4] 40/5 40/9 46/7 52/16 26 [1] 77/17 27 percent [1] 46/7 2:30 [2] 59/5 80/3</p> <p>3</p> <p>3.1 [13] 13/24 14/1 41/15 41/20 41/23 42/11 44/6 44/25 45/1 50/24 51/1 51/6 51/10 3.1 billion [8] 13/23 23/25 28/9 37/19 52/4 52/9 55/6 57/1 3.1-billion-dollar [1] 13/20 30.1 billion [1] 37/18 376 [1] 20/8 38 percent [3] 12/13 71/21 74/22 38-percent [13] 62/3 62/10 62/11 62/14 62/22 64/3 64/9 64/12 65/12 71/25 75/10 75/12 75/16 3:00 [3] 78/24 78/25 79/1</p> <p>4</p> <p>4 percent [2] 43/7 43/10 40 [3] 37/22 68/22 70/4 40 percent [23] 12/9 12/11 30/8 30/17 31/8 31/11 37/18 38/21 39/15 40/13 40/14 45/20 45/21 45/25 46/7 51/6 51/10 51/12 51/22 52/4 52/5 52/5 52/9 40-percent [1] 45/22 48 [2] 69/8 72/12</p> <p>5</p> <p>5 percent [2] 43/12 43/13 504 [9] 16/16 16/24 17/23</p>	<p>19/11 20/16 24/6 57/4 60/16 78/15 591 [5] 12/22 22/3 23/13 55/3 57/2 511-million-dollar [1] 22/6 570,000 [1] 29/1 5:00 [2] 78/25 79/3</p> <p>6</p> <p>60 percent [1] 49/11 62 percent [4] 60/3 63/5 75/17 75/25</p> <p>7</p> <p>702 [6] 65/17 65/20 66/1 66/16 77/14 77/15 711 [1] 56/24 772 [37] 12/15 22/3 23/13 23/19 23/25 24/4 24/5 24/11 24/22 26/17 26/18 27/8 27/11 37/25 38/3 38/7 38/8 39/6 40/24 41/3 41/19 42/5 42/8 42/10 44/3 44/6 44/12 44/17 45/3 45/11 45/19 49/14 49/20 50/5 50/25 55/4 57/3 772 figure [1] 39/3 772 million [3] 52/15 52/15 57/1</p> <p>8</p> <p>80 percent [1] 49/11 834 [1] 20/8 844 [1] 1/16</p> <p>9</p> <p>97 percent [2] 7/10 18/10</p> <p>A</p> <p>able [11] 26/16 29/2 34/7 34/14 34/19 40/10 40/18 44/20 45/12 49/25 64/23 about [42] 8/16 10/21 14/9 15/1 19/14 19/15 19/16 20/14 20/18 21/19 28/19 29/24 30/15 34/8 38/9 39/18 42/2 45/22 46/2 46/4 48/8 49/3 49/4 51/11 53/20 54/4 56/5 58/22 58/24 59/1 60/4 60/13 61/11 66/14 66/19 70/11 70/24 71/2 71/19 75/8 75/21 76/4 above [1] 38/7 absolutely [6] 21/5 24/2 25/3 55/7 57/3 71/4 academic [2] 48/13 48/17 acceptable [2] 33/12 51/3 accessory [1] 49/4 account [8] 6/17 16/5 26/3 26/4 44/8 46/25 51/23 52/6 accounts [23] 6/15 6/16 7/14 13/3 13/5 13/8 13/9 13/11 13/12 25/22 26/23 26/24 28/12 28/13 30/17 43/3 46/2 46/4 46/5 50/17 50/18 52/12 53/1 accurate [2] 74/16 80/9 acknowledge [1] 52/22 acknowledged [1] 29/13 acquiring [1] 70/1 across [2] 27/23 60/4</p>	<p>Act [2] 58/10 61/24 acts [1] 56/4 actual [4] 16/25 46/5 61/5 63/19 actually [17] 4/16 10/3 19/1 21/18 27/5 28/16 43/18 45/7 45/20 46/16 48/14 48/20 51/15 52/23 56/1 69/6 78/8 add [2] 14/6 53/19 addition [3] 8/25 61/23 63/13 additional [1] 70/23 address [4] 6/10 10/11 61/25 68/3 addressed [2] 64/9 73/12 adds [2] 27/8 43/15 admit [1] 46/21 admits [1] 16/5 admitted [3] 15/5 38/13 38/14 adopted [5] 28/21 28/22 57/24 58/5 58/14 adopts [2] 59/25 61/6 advance [1] 42/13 advanced [3] 9/5 31/1 52/2 advertisement [1] 49/3 advertising [1] 55/25 advocate [1] 45/10 affect [1] 59/11 affects [1] 16/1 after [16] 4/22 5/11 14/2 23/4 25/10 25/22 27/7 47/15 54/22 55/18 55/23 56/2 58/6 68/11 69/16 73/14 afternoon [4] 3/5 3/14 3/22 59/18 afterwards [1] 49/17 again [11] 13/14 20/18 31/5 31/22 33/7 38/9 39/8 40/17 40/23 40/25 70/14 against [1] 23/21 agree [10] 5/9 11/17 11/17 18/1 18/15 26/4 35/9 38/7 44/16 45/9 Agreed [1] 11/16 ahead [2] 42/18 61/22 aid [1] 59/21 ALCON [51] 1/7 1/7 1/8 3/18 3/23 4/14 10/20 10/21 11/1 13/4 13/5 13/11 13/13 15/10 15/12 23/1 23/2 29/4 30/5 36/22 37/4 43/3 43/5 47/13 50/17 50/18 50/18 52/13 52/25 61/6 61/16 61/17 62/1 62/4 62/13 62/20 62/25 63/20 65/24 68/11 68/17 69/6 69/12 69/12 69/16 69/22 70/16 71/12 71/18 73/13 76/16 Alcon's [14] 30/17 47/9 52/21 60/3 63/5 64/19 69/8 69/17 70/4 70/5 71/8 72/1 72/12 77/25 all [82] allegation [1] 71/14 allegedly [2] 4/12 12/20 allocate [1] 69/18 allocation [2] 61/7 69/10 allow [1] 11/12 allowed [4] 14/20 14/24 15/3 24/1 almost [4] 29/3 32/10 43/18 45/19</p>
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